

EXHIBIT 1

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

SWINOMISH INDIAN TRIBAL)
COMMUNITY,) Civ. No. C07-1348-RAJ
)
Plaintiff,)
) **SECOND AMENDED CONSENT DECREE**
v.) RE. REMEDY FOR VIOLATIONS OF
) ENDANGERED SPECIES ACT AND
SKAGIT COUNTY DIKE DISTRICT NO. 22,) CLEAN WATER ACT
BOARD OF COMMISSIONERS OF SKAGIT)
COUNTY DIKE DISTRICT NO. 22,)
STANLEY E. NELSON, NOLAN LEE,)
CURTIS B. WYLIE, ROBERT A. HUGHES,)
and DAVID HUGHES,)
)
Defendants.)
)

WHEREAS plaintiff Swinomish Indian Tribal Community ("Tribe") brought this action against defendants Skagit County Dike District No. 22, Board of Commissioners of Skagit County Dike District No. 22, Stanley E. Nelson, Nolan Lee, whose seat on the commission is now filled by Greg Lee (replacing his father Nolan Lee), Curtis B. Wylie, whose seat on the Commission is now filled by John Wolden, Robert A. Hughes, and David Hughes (collectively, "District") in October 2007, alleging violations of the federal Endangered Species Act ("ESA") and Clean Water Act ("CWA") related to certain of the defendants' actions in replacing and

SECOND AMENDED CONSENT DECREE RE. REMEDY
FOR VIOLATIONS OF ENDANGERED SPECIES ACT AND
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1 maintaining tidegates and other drainage infrastructure within its jurisdiction;

2 WHEREAS the Tribe moved for partial summary judgment on its CWA claims related to
 3 the replacement of the Dry Slough, Wylie, and Eakins tidegates, and ESA claims related to the
 4 replacement of the Dry Slough tidegate, and the defendants moved for partial summary judgment
 5 on the Tribe's claims related to the Wylie and Eakins tidegates;

6 WHEREAS this Court granted summary judgment to the Tribe in full on its motion for
 7 partial summary judgment and denied the defendants' motion for partial summary judgment;

8 WHEREAS the Tribe requested that the Court defer granting a remedy to the Tribe for
 9 the adjudicated violations of the ESA and CWA pending an opportunity to negotiate a settlement
 10 regarding remedy;

11 WHEREAS the parties negotiated in good faith in an attempt to resolve the remedy issues
 12 for the violations of law identified by the Court in its September 5, 2008 Order, and moved this
 13 Court to adopt a Consent Decree obligating the parties to undertake certain actions within
 14 specific deadlines;

15 WHEREAS this Court entered an order approving the Consent Decree on January 29,
 16 2009;

17 WHEREAS the Consent Decree set forth a deadline of 18 months for issuance of permits
 18 for construction of a Goose Reserve Restoration Project, and despite the passage of three and a
 19 half years since execution of the Consent Decree, permits have yet to be issued for such
 20 restoration project, and issuance of permits does not appear imminent;

21 WHEREAS the Consent Decree articulated an alternative remedy if permits for
 22 construction of the Goose Reserve Restoration Project were not issued within the 18-month
 23 deadline, namely, the installation of a self-regulating tidegate at Dry Slough;

24 WHEREAS the parties have agreed that installation of a self-regulating tidegate at Dry
 25 Slough is no longer a suitable remedy for the District's violations of the CWA and ESA;

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 27 **SECOND AMENDED CONSENT DECREE RE. REMEDY**
 28 FOR VIOLATIONS OF ENDANGERED SPECIES ACT AND
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1 WHEREAS, the parties have negotiated in good faith to amend the obligations
2 undertaken in the Consent Decree, and seek to substitute them with alternative obligations that
3 resolve the legal issues identified by this Court;

4 WHEREAS, the Tribe is a sovereign tribal government with the responsibility to protect
5 tribal resources and treaty rights, including the Tribe's right under the 1855 Treaty of Point Elliot
6 to take fish at usual and accustomed grounds and stations, and the right to co-manage the
7 underlying fish populations;

8 WHEREAS, the violations alleged in this case have had an actual or potential impact on
9 the habitat and migration routes for those fish populations;

10 WHEREAS, the Skagit Chinook Recovery Plan (2005) ("Recovery Plan") is a
11 comprehensive plan developed in response to the listing of Puget Sound Chinook as threatened
12 under the Endangered Species Act, with the participation of a number of interested governmental
13 and non-governmental parties including the Tribe and the State of Washington, for the purposes
14 of meeting recovery goals established by area co-managers for salmon populations in the Skagit
15 River Basin and proposing "scientifically-based actions that will restore Skagit River Chinook to
16 optimum levels;"

17 WHEREAS, the Court finds and determines that it has jurisdiction to enter this Decree,
18 and the Court finds and determines that this Consent Decree represents an adequate and equitable
19 resolution of the claims raised in this action, and is intended to further the goals and objectives of
20 both the CWA and ESA by helping to protect and restore Puget Sound Chinook salmon;

21 NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, AND DECREED as
22 follows:

23 I. PARTIES

24 The parties to this Consent Decree are the plaintiff and the defendant District. This
25 Consent Decree applies to, is binding upon, and inures to the benefit of plaintiff and individual

1 defendants named in their official capacity and their respective successors, assigns, and
 2 designees.

3 **II. OBLIGATIONS OF DEFENDANTS**

4 Defendants hereby agree to pay to the plaintiff the sum of \$500,000 for the express and
 5 sole purpose of implementing actions that promote the recovery goals established in the
 6 federally-adopted Endangered Species Act Recovery Plan for Puget Sound Chinook salmon.
 7 The Recovery Plan identifies numerous actions to protect, restore, evaluate, and monitor habitat
 8 conditions for Skagit Chinook salmon, with an emphasis on both protection of existing habitat
 9 conditions and restoration of degraded habitat. The plaintiff Swinomish Tribe, as a party to the
 10 Recovery Plan and a sovereign tribal government and co-manager of the underlying salmon
 11 population, shall utilize the funds paid by defendant to implement habitat protection and
 12 restoration actions, projects, and measures that are supportive of and consistent with the
 13 Recovery Plan and promote its numeric recovery goals. Examples of suitable projects for which
 14 funding could be used include but are not limited to: a) evaluating compliance with permit
 15 conditions in permits issued by State, Federal and County governments with the goal of helping
 16 to achieve compliance with those permits; b) evaluating fish passage blockages and
 17 implementing restoration actions to remedy such blockages and/or advocate that other potentially
 18 responsible parties do so; c) evaluating sources of instream pollution and implementing plans to
 19 reduce it; d) planning and implementing research projects on estuary survival and limiting
 20 factors; (e) evaluating the effectiveness of habitat mitigation measures and other conditions in
 21 permits issued by Federal, State, and County government intended to be protective of Skagit
 22 Chinook salmon and their habitat, with the goal of supporting the effective implementation of
 23 those measures and conditions. Funds received from defendant under this paragraph may not be
 24 used for litigation or political lobbying activities.

25 The funds will be paid out in four equal payments of \$125,000 as follows:
 26

1 Twenty-one days after the Effective Date of this Second Amended Consent Decree;
 2 December 1, 2012;
 3 December 1, 2013;
 4 December 1, 2014.

5 Defendants agree that time is of the essence in its performance of its obligations.

6 B. Defendants will support and participate in the Final Design Phase and later
 7 implementation phases recently published as a Scope of Work for the Fir Island Farm
 8 Restoration Project proposed by Washington Department of Fish and Wildlife at the Goose
 9 Reserve on Fir Island, Skagit County. Defendants shall not advocate for any reduction in the
 10 size of the project unless hydrologic analysis demonstrates that a reduction would be necessary
 11 to provide drainage equivalent to what is currently in place. In the event that the Washington
 12 Department of Fish and Wildlife, as the landowner, implements a final project smaller than the
 13 First Amended Consent Decree “proposed GRRP” described in Exhibit “A” and jointly
 14 advocated by the parties to the First Amended Consent Decree, the defendants shall not withhold
 15 their support of the final project that is permitted and funded.

16 III. RELEASE BY PLAINTIFF; VIOLATIONS OF CONSENT DECREE

17 Providing that the District complies with its obligations undertaken in this Consent
 18 Decree, the Tribe waives its claim to other remedies to which it is entitled with respect to the
 19 District’s CWA and ESA violations, including but not limited to civil penalties, injunctive relief,
 20 and an award of attorneys’ fees and costs. Plaintiff agrees that all funds provided pursuant to this
 21 Consent Decree will be used exclusively to implement actions consistent with the Skagit River
 22 chapter of the Puget Sound chinook salmon recovery plan in lieu of installing a self-regulating
 23 tidegate at Dry Slough, the reasonable prudent alternative proposed by the National Marine
 24 Fisheries Service. Plaintiff will maintain all funds in a separate financial account, and track all
 25 expenditures therefrom. Plaintiff will provide an annual report on the use of the funds to the

Court, the United States Department of Justice, and defendants describing the activities for which funds were used and how those activities further the goals of the Recovery Plan, and the amounts expended for each activity, until funds are fully expended. The annual report will be provided on the anniversary each year of entry of this Second Amended Consent Decree by the Court.

If the defendants fail to submit the agreed funds on time, defendants agree to pay interest on the amount then due at a rate of 3% per month, compounded monthly, until paid. In addition, if defendants are over one month late on any payment and/or have indicated in any way that they do not intend to pay as agreed or if they violate their continuing obligations to support the Fir Island Farm Restoration Project proposed by Washington State Department of Fish and Wildlife as defined above, the Tribe is entitled at any time to bring a motion for specific enforcement of such terms, and/or, in the Tribe's discretion, a motion for entry of penalties, injunctive and declaratory relief, and award of attorneys' fees and costs associated with this litigation, including attorneys' fees and costs associated with bringing an enforcement motion.

IV. EFFECTIVE DATE

This Consent Decree shall become effective upon the date of its entry by the Court. If for any reason the Court does not enter this Consent Decree, this Consent Decree shall not impose any obligations upon the Parties and the Tribe will proceed with a motion for an award of penalties, declaratory and injunctive relief, and/or an award of attorneys' fees and costs.

V. TERMINATION OF CONSENT DECREE AND DISMISSAL OF CLAIMS

The Court shall retain jurisdiction to effectuate compliance with this Consent Decree until the parties file a notice of compliance with the terms of this Consent Decree. Upon filing of such Notice, plaintiff's remaining claims shall be dismissed with prejudice.

Pending the filing of such notice, this Court shall have jurisdiction to enforce the terms of this Consent Decree on motion from either party.

1 VI. DISPUTE RESOLUTION

2 In the event of a disagreement between the Parties concerning the interpretation or
 3 performance of any aspect of the Consent Decree, the disputing party shall provide the other
 4 Party with written notice of the dispute and a request for negotiations. The Parties shall meet and
 5 confer in order to attempt to resolve the dispute. If the Parties are unable to resolve the dispute
 6 within fourteen (14) days of such notice, or such time thereafter as is mutually agreed, then either
 7 Party may petition the Court to resolve the dispute.

8 VII. MODIFICATIONS AND EXTENSIONS

9 The Parties may change any term established in this Consent Decree by written
 10 stipulation executed by counsel for the Parties and filed with the Court.

11 VIII. NOTICE

12 All communications and correspondence related to this Consent Decree shall be by and
 13 through undersigned counsel for the Parties.

14 IX. PROTECTION OF INTERESTS OF THE UNITED STATES

15 Pursuant to 33 U.S.C. § 1365(c)(3), notice of this proposed consent decree has already
 16 been given to the Administrator of the EPA and the Attorney General, who will provide this
 17 Court a letter stating that there is no objection to the entry of this Consent Decree.

18 X. SIGNATORIES

19 FOR THE PLAINTIFF


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 22 Earthjustice
 23 705 Second Avenue, Suite 203
 24 Seattle, WA 98104
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24 Dated: October 5, 2012

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2 FOR THE DEFENDANTS
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Dated Oct. 4, 2012

**SECOND AMENDED CONSENT DECREE RE. REMEDY
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